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 Sen. John Morse, Vice Chair
 Rep. Bob Gardner
 Rep. Daniel Kagan
 Rep. Claire Levy
 Rep. Ellen Roberts
 Sen. Greg Brophy
 Sen. Morgan Carroll
 Sen. Shawn Mitchell
 Sen. Gail Schwartz



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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 31, 2010

The Committee on Legal Services met on Wednesday, March 31, 2010, at 8:03 a.m. in HCR 0109. The following members were present:

Representative Labuda, Chair
 Representative B. Gardner
 Representative Kagan (present at 8:10 a.m.)
 Representative Levy
 Representative Roberts
 Senator Brophy (present at 8:14 a.m.)
 Senator M. Carroll
 Senator Morse, Vice-chair
 Senator Schwartz (present at 8:04 a.m.)

Representative Labuda called the meeting to order.

8:04 a.m. -- Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1 - Action on SB 10-060.

Ms. Haskins said the bill before you is Senate Bill 10-060. You're sitting as the House committee of reference on the bill today. There were no amendments made to the bill in the Senate. The bill deals with the rules that were adopted by the executive branch agencies between November 1, 2008, and before November 1, 2009. Pursuant to the "State Administrative Procedure Act", those rules would expire on May 15, 2010, except for this bill. This bill will postpone that expiration indefinitely for the rules by department, with the exception of the rules that are listed in the bill. Those rules are the ones that the Committee previously found had a problem with statutory conflict, lack of statutory authority, or exceeded statutory authority.

Those rules are listed specifically in the bill and they will expire on May 15, 2010. There are no bills that have been introduced this session related to any of the rule review issues that we are aware of. We just need you to act on the bill and send it to the floor.

8:06 a.m.

Hearing no further discussion or testimony, Senator Carroll moved Senate Bill 60 to the committee of the whole with a favorable recommendation. Representative Levy seconded the motion. The motion passed on a 7-0 vote, with Senator Carroll, Senator Morse, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, and Representative Roberts voting yes.

8:07 a.m. -- Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 2 - Retention of Counsel in *Bruce v. State*.

Mr. Pike said the purpose for this item on the agenda is the potential retention of counsel to represent the General Assembly in the lawsuit that former Representative Bruce filed last Friday. Basically, the complaint is against the state of Colorado, the Governor, and the General Assembly and Mr. Bruce is asserting that the methodology used by the legislature to establish the TABOR reserve by utilizing, as a portion of that reserve, certain state buildings is unconstitutional and not in conformance with TABOR requirements. As part of his claim, he's also asserting that because the legislators participated in this, each member should sacrifice a certain portion of his or her salary as a penalty for their conduct. Our usual approach to litigation involving the General Assembly is, in the first instance, to continue to try to preserve legislative immunity. I think that would be the first thing, that we would attempt to assert by way of a motion to dismiss that the institution is immune from this kind of lawsuit. The question this morning is, if you'd like to do so, to retain counsel for the purpose of pursuing a motion to dismiss.

Representative Roberts asked does this rise to the level of frivolous and vexatious? Is that something an attorney would consider and seek attorney fees if the court were to allow it? Mr. Pike said that may be an issue that goes into tactics, so I'm not sure I want to go too far in an open meeting. I don't know if that would be appropriate, in an initial instance at least, with regard to the immunity issue and the motion to dismiss, but we could certainly discuss that with counsel and see whether that's appropriate under the circumstances. I suspect there are some who would feel like there may be a basis, at least, for the assertion.

Representative Roberts said I would just ask, as a member of the Committee, that it at least be discussed. I don't know that the Committee has a role in deciding that, but whomever we retain I would ask that we consider that closely.

Senator Carroll asked if there's ever been a case where legislative immunity has been pierced? Mr. Pike said not that I know of off the top of my head. There have been situations where the legislature has been involved in litigation where there's been an ancillary principle asserted that it's an issue that can't be addressed if it's a political issue, and, therefore, the General Assembly shouldn't be involved in answering a political question. There have been some lawsuits, I think, where the General Assembly has elected to participate, even though they might have been able to assert immunity. I'm not aware of any case where immunity has actually been pierced. Mr. Pike asked Sharon Eubanks if she recalls any off-hand?

Ms. Eubanks, Deputy Directory, Office of Legislative Legal Services, said [off mic] in *Bledsoe v. Common Cause*, procedures in the General Assembly were being challenged. I don't know if I'd say it was pierced directly but there were some issues there.

Mr. Pike said if it would be helpful for the Committee, we can give you the names of the folks who have participated in representing the General Assembly in recent litigation for purposes of considering folks who have a background in representing the General Assembly and some experience in these kinds of matters. You all could elect to retain somebody who has not represented the General Assembly before. We think, under these circumstances, where you have to act fairly expeditiously, that it would probably be a better idea to retain someone who is familiar with representing the General Assembly, who is familiar with the process, and who has worked for you all before. Our recommendation, were you to ask us, would be that you consider retaining someone who has had prior experience.

Senator Carroll said for whatever it's worth, I think the motion to dismiss based on legislative immunity is something that needs to be asserted before it's waived. I don't know who's on the list but would generally concur that it's probably better that someone who is used to arguing this issue promptly take it up.

Representative Gardner asked Mr. Pike what he needs from the Committee by way of a motion and approval of that motion to retain counsel, assert legislative immunity by way of a motion to dismiss, and move this down the

road? Mr. Pike said the usual process would be for you to have a motion to direct that the Office approach a particular firm or individual with respect to representation, having in mind that we would come back to you if for some reason they were unavailable or unable to represent the General Assembly under the constraint that you all impose, which is the \$160 per hour limitation on counsel who represents the General Assembly.

Representative Labuda said Mr. Pike brought this to me yesterday or the day before. He also gave me a list of the people we have retained in the past. I looked at the list and checked with both the minority leader and the majority leader, and they both said they were fine with the first name that appeared on the list, which is an attorney from the law firm of Holland and Hart.

Mr. Pike said that was Maureen Witt with Holland and Hart. The second group I think was Lino Lipinsky and Richard Kaufman from McKenna Long & Aldridge, LLP.

Representative Labuda said, for what it's worth, both the minority leader and majority leader agreed that the names, as you got further down on the list, were more active politically and probably weren't our top priority, so we should try and get Holland and Hart first.

Representative Levy said for the sake of expediency, is it necessary for us to identify a particular attorney for you to approach? Can we just authorize you to retain counsel? Mr. Pike said you could. That's up to the Committee. If you have a preference, that's generally been what you've done, but I think you could direct us in either fashion.

Senator Schwartz said I think with respect to the nuance of politically engaged individuals or firms, perhaps the ability of providing input from the Committee would be helpful. I think that's a lot of responsibility to put on Mr. Pike to make that determination.

Representative Gardner said my inclination is to authorize the Office to retain counsel from among the list that we've been shown, in case there's any problem with the first counsel. Both firms that have been mentioned are quite capable and the attorneys are quite capable. And that we get this done and move on down the road because, frankly, for those of us who've prepared a motion to dismiss, we need to get started.

Senator Schwartz said with respect to Representative Gardner's recommendation, I would ask that the Committee be notified of the selection.

Mr. Pike said if the Committee is inclined to go that direction, I can tell you that we would talk first with Maureen Witt with Holland and Hart. They've done the most recently with respect to these kinds of issues and, anticipating the possibility of this meeting, we have asked her whether or not they would be available and she has indicated that they would be. That's likely to end up being our choice should you pursue it that way.

8:19 a.m.

Hearing no further discussion or testimony, Senator Morse moved to direct the Office to engage Maureen Witt with Holland and Hart, and, failing that, that they move to McKenna Long & Aldridge on the list. Representative Gardner seconded the motion. The motion passed on a 9-0 vote, with Senator Brophy, Senator Carroll, Senator Morse, Senator Schwartz, Representative Gardner, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting yes.

8:20 a.m. -- Charley Pike said Sharon Eubanks is handing something out that's in response to a question that was asked when we were discussing the budget for the Office. Representative Roberts asked us if we could allocate, at least in some rough fashion, the amount of time the Office spends on the different kinds of duties the Office performs over the course of a particular year. These were the items that were listed as the main Office functions in our budget document. We did a survey of everyone in the Office. We couldn't, at this point in the session, do a desk audit or anything like that, but what we did was we gave a survey to every employee and gave them a couple weeks to think about it and asked them to allocate proportionately the amount of time they spend on all of these different major functions - the drafting services, the reviewing and enrolling of bills, rule review, litigation, publications, initiatives, legislative record-keeping, which is a statutory requirement, and "other", which encapsulates everything else we do that doesn't fit in one of those other major categories. We did have the staff break it out in terms of the allocation of their time, both during a legislative session and then also during the interim. You can see that the pie charts indicate that activity as it's allocated by all of the staff during the session first. The drafting services, as you would expect, take up the most time. Then you go to the interim and of course the drafting services are substantially diminished and what's reflected there would usually be the interim committee work as well as pre-session drafting for the different members who get their bill requests in early, and then an increased emphasis on the publications function, which we dive into right after the legislative session and do a lot of work on during the interim. Then, the final chart rolls all of those things together. The next page shows you an

allocation by individuals as to how they allocated their time among all of the different functions. I can tell you that probably one of the reasons why the "other" is fairly substantial for some individuals is because that's likely to be myself and the deputy directors who don't do anything else other than "other". This was helpful for us and I appreciate the request from Representative Roberts. It did make us sit down and think about the allocation of time and how things are. At least it gives you a snapshot of how our time is allocated on an individual basis as well as an office-wide basis.

Representative Labuda said on the second page under attorney averages, under the litigation part even during session, is that just getting information as needed to outside counsel? Could you explain? Mr. Pike said generally it would be a number of things like that, such as coordinating with outside counsel. Very often we may end up going down to a court session with outside counsel if that's appropriate. Recently we had a hearing in district court that Ms. Eubanks and I both attended. It may also involve other staff. Ms. Haskins, for example, prepares a summary of the litigation that we track, not only litigation that we're directly involved in, but litigation that is of interest to the members. That's likely to be focused primarily on myself, Sharon Eubanks, Dan Cartin, and Debbie Haskins. Perhaps occasionally some other folks would be asked to assist us in doing some research for litigation purposes.

Senator Carroll said I want to thank you and your staff for taking the time to do this and digest it in a simple two pages for us. I think you gave us even more than what Representative Roberts was asking for, but this is very helpful for the Committee. Mr. Pike said Matt Dawkins did the collation of the statistics and the pie charts. He's great at synthesizing the materials for us.

Representative Levy asked what is publications? Are those the memos you prepare? Mr. Pike said publications is actually the work the Office does in preparing the session laws and the statutes. Everybody on the staff is involved in some fashion in assisting in the publications process, but we have specific group of folks who are primarily dedicated to the publications process - Jennifer Gilroy and the publications staff - who work primarily on coordinating all of the Office work in getting the publications work put together. We focus first on the digest, then the session laws, and then incorporating the statutes adopted in the session laws into the statutory database, along with all of the annotations and editorial work. That's all put together by our staff as part of the product of preparing the statutes for publication. Then, of course the Committee has contracted with Lexis for the printing of the statutes and the distribution to the public, but that's about all

they do. All of the work necessary for the preparation of the statutes is done in-house.

Representative Labuda said thank you very much for preparing this. It interests me. I had no idea what the breakdown was and I think we all appreciate that very much. Mr. Pike said we found it interesting as well.

8:29 a.m. -- Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed the Committee.

Mr. Brackney said I'm pleased to report to you that each of the three bills that came out of the discussions the Committee had with the secretary of state late last year and early this year have passed both houses of the legislature. None of them have been signed by the Governor yet. The only amendment made to any of the three bills was one on the House floor that had to do with the bill regarding the incorporation by reference. It struck the requirement that the agencies themselves maintain a copy of the material on their own web site, which has the effect of returning it to the original proposal that the material be kept on the web site of the state publications depository library. Those people now will either have a paper copy or an electronic copy, which models the model state administrative procedure act. It's a happy ending to our story.

Representative Labuda asked is the rule review bill the last bill that we will discuss this session? Mr. Brackney said I imagine so.

Representative Labuda said the only thing we might come back for is if we want an update on the Bruce v. State litigation before the end of session. Perhaps if Mr. Pike would let us know when some action is taken and if the court acts. I don't know if we need to get together to meet for that, but if we could somehow be apprised.

Representative Levy asked that the Committee at least get the litigation report.

Mr. Pike said we'll contact you all individually and bring you up to date on anything that transpires in the case itself and if necessary we would suggest a meeting later on if that's something that the Committee would like.

8:31 a.m.

The Committee adjourned.